STATEMENT OF THE CASE

A. Factual Background

In 1995 and 1996, LBSF and Fin One entered into four standard foreign currency swap and option transactions (the "Swap Transactions") pursuant to a standard form "Master Agreement" published by the International Swaps and Derivatives Association, Inc. These Swap Transactions were of a type commonly used by financial institutions to manage risk relating to fluctuating currency exchange rates. Under these transactions, either Fin One or LBSF potentially could have owed a payment to the other, depending on movements in the applicable currency exchange rates.

Separately, between September 1996 and March 1997, an affiliate of LBSF, Lehman Brothers (Thailand) Ltd. ("Lehman (Thailand)"), purchased bills of exchange issued by Fin One (the "Bills of Exchange"), which are a type of freely negotiable debt instrument similar to a zero coupon bond. In return for money Lehman (Thailand) paid to Fin One at the time of purchase, the holder of the Bills of Exchange ultimately would be entitled to payment from Fin One of the Bills' full face value. Lehman (Thailand) sold the Bills of Exchange to LBSF in 1997 at the prevailing market price.

By mid-1997, Fin One's financial condition had deteriorated. By order dated June 26, 1997 (the "June 26 Order"), which was first publicly announced on June 27, 1997 — after the Bills of Exchange had been sold to LBSF — the Thai Ministry of Finance took the unprecedented step of directing Fin One to temporarily suspend certain operations for a period of 30 days. Thereafter, LBSF declared a "material adverse change" under the Master Agreement, terminated the

Swap Transactions, and determined that it owed Fin One $9,664,204 on account of those terminated transactions. Fin One did not dispute LBSF's right to terminate the Swap Transactions or LBSF's calculation of the termination amount. Since Fin One owed LBSF money under the Bills of Exchange and LBSF owed Fin One money under the terminated Swap Transactions, LBSF notified Fin One that it was setting off those amounts against each other. LBSF subsequently remitted payment of the difference to Fin One, which was accepted.

The Ministry of Finance issued a second order, dated July 25, 1997 and effective July 28, 1997 (together with the June 26 Order, the "Ministry Orders"), generally suspending the operation of Fin One until it completed a "rehabilitation" program. On December 8, 1997, the Ministry of Finance determined that Fin One was beyond rehabilitation and it was ordered to cease business. Thereafter, Fin One was placed in insolvency proceedings in Thailand for the purpose of liquidating the company. A Special Manager was appointed by the Thai government's Financial Restructuring Authority to wind-down the business of Fin One and distribute to creditors the proceeds from the liquidation.

LBSF reasonably assumed there was no dispute between the parties since Fin One did not object to the set-off at the time it was done and had accepted the cash payment for the remaining amount owed. That assumption was reinforced when approximately two years later the Special Manager of Fin One informed LBSF in writing that it could "validly apply and set-off against the face value of the [Bills of Exchange]" the amount due under the terminated Swap Transactions so long as LBSF met certain criteria, which it did. Joint Appendix ("JA") 650.

B. The District Court Proceedings

Approximately three years after accepting LBSF's set-off payment, Fin One filed a breach of contract action alleging that the set-off was invalid and that LBSF breached the Master Agreement by failing to pay Fin One in cash the full amount of the Swap Transactions' termination payment. The district court accepted Fin One's argument that Thai law should apply to the issue of whether LBSF's set-off was legally effective. Full discovery was conducted and the parties then cross-moved for summary judgment. The parties each submitted extensive affidavits (collectively totaling over 50 pages with 47 exhibits) from recognized Thai authorities (a former Thai Supreme Court Judge and a Professor at a highly-regarded Thai law school) explaining Thai law and attaching translations of the relevant Thai law materials. After considering the summary judgment motions and affidavits, the district court determined, with explicit reference to Rule 44.1, that additional information regarding Thai law would assist the court in reaching a decision and requested that the parties propose candidates to serve as special master with the understanding that the person selected would be asked to render a report on Thai law.

The district court appointed one of the candidates proposed by Fin One — Professor Sompong Sucharitkul — as the "Special Master."[1] The Special Master issued an initial report, dated January 14, 2003, and a corrected report, dated January 17, 2003 (correcting certain typographical errors). In his January 17 corrected report, the Special Master concluded, pursuant to Section 341 of the Thai Code, that LBSF was entitled to set-off. Pet. App. 99a ¶ 26. On April 4,

1. LBSF objected to that appointment based on, among other things, Professor Sucharitkul's close relationship with the Thai government, which was involved in Fin One's liquidation.

2003, the Special Master issued a supplemental report (together with the corrected report, the "Report") in which he clarified for the district court that LBSF acted in good faith under Thai law:

> [T]he wish of Lehman Brothers Special Financing Inc. or the defendant to prevent further losses that it might and would incur by attempting to redeem the bills of exchange at a critical moment before their maturity dates in order to be in a position to exercise "to the maximum extent possible" its set-off right, if any, is a legitimate concern and not inconsistent with the Thai concept of "good faith." There was no evidence to show that the purpose of the exercise was to take undue advantage, less to defraud other possible creditors. The conduct of Lehman Brothers in so doing, in the considered opinion of the Special Master, is neither out of order, nor contradictory to the practice of a prudent or diligent business management.

Pet. App. 106a ¶ 12.

On May 1, 2003, the district court issued a decision and order, adopting the Special Master's conclusions and holding that LBSF was entitled to set-off the Bills of Exchange. Pet. App. 51a. The district court also adopted the Special Master's proposal that the court exercise its "equitable discretion" to limit the amount of set-off and reduced LBSF's set-off by approximately 45 percent. Pet. App. 53a. Because the district court reduced the set-off, it entered judgment against LBSF for a portion of the amount sought by Fin One. Pet. App. 48a-49a. Both parties appealed.

C. The Second Circuit's Decision

The Second Circuit affirmed the district court's conclusion that Thai law governed the disputed set-off and conducted a *de novo* review of the district court's interpretation and application of that law. Pet. App. 29a. The Second Circuit agreed with the Special Master and the district court that Section 341 of the Thai Code provides an "unambiguous right to set off mutual obligations against one another" and was applicable to the disputed set-off in this case. Pet. App. 31a. The Second Circuit then carefully considered each of the arguments against set-off raised by Fin One, devoting particular attention to Fin One's argument that the Ministry Orders prohibited the set-off and its argument that the district court failed to properly apply Thai law when considering the issue of LBSF's good faith because that court did not reach the same outcome as a lower Thai civil court in the unrelated case of *Huaykaew Real Estate Co. v. CMIC Finance & Securities Public Ltd.*, Book No. 7085/2542 No. 78 (S. Bangkok Civ. Ct., June 14, 1999) ("*Huaykaew*").

The court of appeals first addressed the effect of the Ministry Orders. Considering both the plain language of the Ministry Orders, as well as other Thai law, the Second Circuit found that while the Orders "clearly forbade Fin One from voluntarily making payment on any of its outstanding bills of exchange," they did *not* preclude a party that was both a debtor and a creditor of Fin One from setting off that party's and Fin One's mutual obligations. Pet. App. 32a-33a. The Second Circuit considered "this result . . . sensible in light of Section 342 [of the Thai Code], which renders setoff a right exercisable unilaterally, with no requirement that the other party consent." Pet. App. 33a. Accordingly, the Second Circuit found that LBSF's set-off was not prohibited by the Ministry Orders. Pet. App. 33a.

The court of appeals next addressed Fin One's assertion that *Huaykaew* required the district court to conclude that LBSF acted in bad faith in acquiring the Bills of Exchange and therefore could not use amounts owed to LBSF on the Bills as a set-off. Contrary to Fin One's repeated claim in its Petition that the Second Circuit found *Huaykaew* to be "indistinguishable," in fact, the court of appeals noted a "significant distinction" between *Huaykaew* and this case that goes directly to the issue of good faith — namely, the timing of the acquisition of the securities that were set-off against the debt owed. Pet. App. 34a. In *Huaykaew*, the securities were acquired with knowledge of the suspension order and the resulting inability of the company in question to pay its creditors. In contrast, there can be no question that LBSF acquired the Bills of Exchange prior to and without any knowledge of the Ministry Orders since the Bills were acquired before the suspension of Fin One's business was announced. Pet. App. 34a. The court of appeals further noted that *Huaykaew* is "of especially limited persuasive authority" because it was "a trial-court case from a civil-law jurisdiction where judicial decisions in general are of only persuasive and not binding authority." Pet. App. 35a. Having determined that *Huaykaew* was both distinguishable on its facts and of limited precedential value, the Second Circuit correctly found that case to be no impediment to its determination that LBSF's set-off was valid pursuant to Section 341 and the "statutory presumption of good faith in Section 6 of the Thai Civil and Commercial Code." Pet. App. 35a.

Lastly, the Second Circuit considered Fin One's argument that the set-off violated Thai public policy by giving a "windfall" to LBSF at the expense of other Fin One creditors. Pet. App. 37a. The Second Circuit rejected Fin One's argument that LBSF was being given an undue advantage or receiving a

"windfall" relative to Fin One's general creditors because LBSF was "not similarly situated to creditors who are seeking payment as opposed to setoff." Pet. App. 37a. In reaching its conclusion, the court of appeals identified several instances where the Thai Code treats "the right to setoff differently from the right to receive actual payment of an obligation." Pet. App. 37a.

Having determined that LBSF was entitled to set-off under Thai law, and that there was no basis for equitably reducing the value of the Bills of Exchange for purposes of the set-off, the court of appeals unanimously reversed the district court's entry of judgment for Fin One and remanded for entry of judgment in favor of LBSF. On August 8, 2005, Fin One filed petitions for panel rehearing or rehearing *en banc* with the Second Circuit. Those petitions raised a number of the same arguments advanced in Fin One's Petition for certiorari. The petitions were denied on January 3, 2006. With respect to Fin One's request for rehearing *en banc*, not a single eligible judge on the Second Circuit sought a vote on whether to reconsider the panel's decision. This Petition for certiorari followed.

REASONS FOR DENYING THE PETITION

Fin One's Petition falls far short of establishing the required "compelling reasons" necessary to justify the expenditure of this Court's resources for a full review of the case. *See* Sup. Ct. R. 10. The main thrust of the Petition is that the court of appeals improperly interpreted and applied Thai law by allegedly failing to follow *Huaykaew* — a Thai lower court decision that is indisputably not even binding on a Thai court — and improperly analyzed legal issues relating to the Ministry Orders as "questions of fact" rather than as "questions of law." Pet. 1-2. According to Fin One, the Decision altered *sub silentio* well-settled Second Circuit law regarding Rule 44.1 (thereby purportedly creating a conflict among the circuits) and "flouted" principles of international comity.

As demonstrated below, none of Fin One's arguments has merit. Principles of international comity are inapplicable to the procedure for determining foreign law, and the Second Circuit properly adhered to both the letter and spirit of Rule 44.1 in interpreting and applying Thai law in a manner that is fully consistent with well-settled precedent of the Second Circuit as well as other circuit courts of appeal. In addition, the uniqueness of this dispute over Thai law severely limits any possible precedential value that review of the Decision may engender. The Petition thus presents no broad questions of general importance beyond the resolution of this specific controversy and also should be denied on that independent basis. *See NLRB v. Pittsburgh, S.S. Co.*, 340 U.S. 498, 502 (1951); *Layne & Bowler Corp. v. W. Well Works, Inc.*, 261 U.S. 387, 393 (1923); *see also United States v. Johnston*, 268 U.S. 220, 227 (1925).

Finally, this case is inappropriate for review by this Court because — stripped of its many pages of "circuit conflict" and "principles of international comity" rhetoric — it comes down to nothing more than Fin One's request to reconsider an outcome with which it disagrees. The court of appeals carefully and thoroughly interpreted and applied Thai law in accordance with Rule 44.1 and reached a well-reasoned conclusion. Even if that were not the case and the court of appeals misapplied the law and reached the wrong outcome (which it did not), Fin One still would have no basis to seek a writ of certiorari. *See* Sup. Ct. R. 10. As this Court has emphasized, "jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing." *Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923); *see also Rudolph v. United States*, 370 U.S. 269, 270 (1962); *Rice v. Sioux City Mem. Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955). The Petition should be denied.

I. THERE IS NO SPLIT AMONG THE CIRCUIT COURTS OF APPEAL REGARDING RULE 44.1, WHICH WAS CORRECTLY APPLIED IN THIS CASE

In a contrived attempt to fit the issues raised by this case within the narrow class of issues worthy of Supreme Court review, Fin One claims that the Decision fundamentally altered the Second Circuit's interpretation of Rule 44.1 by making determinations of foreign law a "question of fact" and imposing an "evidentiary burden" on Fin One, thereby allegedly creating a conflict with other circuit courts of appeal. Pet. 25-26. Fin One's argument that the Second Circuit now interprets the plain "question of law" language in Rule 44.1 to mean instead "question of fact" is based entirely on Fin One's misreading of the Decision.

A. The Second Circuit Adheres To Both The Language And Spirit Of Rule 44.1 And Its Approach Is Consistent With Other Circuit Courts Of Appeal

Rule 44.1 is intended to provide "flexible procedures for presenting and utilizing material on issues of foreign law by which a sound result can be achieved with fairness to the parties." Fed. R. Civ. P. 44.1, Adv. Cmte. Notes. To that end, courts "may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible. . . ." Fed. R. Civ. P. 44.1. Pursuant to the plain language of Rule 44.1, a court's determination of foreign law "shall be treated as a ruling on a question of law" (as opposed to pre-Rule 44.1 when such a determination was a "question of fact"), with the result that appellate review is not limited to the "clearly erroneous" standard. Fed. R. Civ. P. 44.1, Adv. Cmte. Notes.

Since the adoption of Rule 44.1 approximately 40 years ago, the Second Circuit has frequently been called upon to review determinations of foreign law and, pursuant to the plain language of the Rule, has consistently treated those determinations of foreign law as "questions of law" to be reviewed *de novo*. *See, e.g.*, *United States Fid. & Guar. Co. v. Braspetro Oil Servs. Co.*, 369 F.3d 34, 53 (2d Cir. 2004); *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 313 F.3d 70, 80 (2d Cir. 2002); *Carlisle Ventures, Inc. v. Banco Español de Crédito, S.A.*, 176 F.3d 601, 604 (2d Cir. 1999); *Curley v. AMR Corp.*, 153 F.3d 5, 11 (2d Cir. 1998). The Second Circuit has recognized the flexible nature of Rule 44.1 and will not hesitate to request additional briefing or to independently research foreign law when needed. *See Curley*, 153 F.3d at 12-13; *see also generally Ackermann v. Levine*, 788 F.2d 830, 838 (2d Cir. 1986); *Loebig v. Larucci*, 572 F.2d 81, 85 (2d Cir. 1978).

The majority of Fin One's Rule 44.1 argument consists of an extended history lesson on the federal courts' method of determining foreign law both before and after the enactment of that Rule in 1966. Pet. 18-21. Then, based on nothing more than this recitation of Rule 44.1's history — coupled with the unexceptional phrase in the Decision stating that Fin One "bears the burden of establishing its defense to enforcement of the [B]ills" (Pet. App. 33a) — Fin One asserts that the Decision "'applied pre-1966 law'." Pet. 21.

Fin One's argument is belied by the text of the Decision itself, which makes it clear that the Second Circuit did not overturn 40 years of law. Fin One cannot dispute that *nothing* in the text of the Decision states, or even remotely suggests, that the Decision is overruling Second Circuit precedent on Rule 44.1, which is hardly surprising given that the panel hearing this case would have no authority to do so.[2] Similarly, there is *nothing* in the text of the Decision stating that the Second Circuit is imposing any type of "factual" or "evidentiary" burden on Fin One, or that it is reviewing the district court's determination of Thai law under the "clearly erroneous standard," which is used to review questions of fact. Indeed, the Decision explicitly states that it is applying a *de novo* review to the determination of Thai law, which is

2. In the Second Circuit, a panel *must* follow circuit precedent unless a Supreme Court decision or an *en banc* holding of the Second Circuit overrules the precedential decision. *Anderson v. Recore*, 317 F.3d 194, 201 (2d Cir. 2003). In addition, Judge Pooler, who authored the opinion in this case (Fin One incorrectly lists Chief Judge Walker as the author in its Table of Contents for Appendix), also was a member of the unanimous panel that decided *Karaha Bodas*, 313 F.3d 70, which interpreted Rule 44.1. Judge Pooler's opinion here made no reference to a diversion from the longstanding principles applied in *Karaha Bodas*. It is difficult to believe that Judge Pooler would have overruled one of her previous decisions without stating as much.

the standard used to review questions of law. Pet. App. 29a. Finally, Fin One has not pointed to any court or commentator who has interpreted the Decision as changing Second Circuit law, and has not otherwise shown that the Decision has engendered any confusion as to the state of that law.[3] In short, nothing supports Fin One's position that the Second Circuit overruled standing precedent and made new law concerning the meaning of Rule 44.1.[4]

Nor can Fin One substantiate its claim that the Decision "deepen[ed] an enduring split among the courts of appeal." Pet. 1. Like the Second Circuit, the other circuit courts of appeal treat determinations of foreign law as legal, not factual issues, and have construed and applied Rule 44.1 in a manner

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3. Although the Decision has been cited by the lower courts since it was issued, *none* have done so in the Rule 44.1 context. Instead, the district courts in the Second Circuit that have had occasion since the Decision to utilize Rule 44.1 have continued to apply that Rule in the same manner as before and without any suggestion that the Decision has changed or confused the law. *See, e.g., Kiobel v. Royal Dutch Petrol. Co.*, No. 02-CIV-7618, 2005 WL 1925656, at *7 (S.D.N.Y. Aug. 11, 2005); *see also generally Phoenix Four, Inc. v. Strategic Res. Corp.*, No. 05 Civ. 4837, 2006 WL 399396, at *8 & n.3 (S.D.N.Y. Feb. 21, 2006).

4. Fin One attempts to fault the Second Circuit in this case for not either applying the law of the forum (New York), requesting further briefing on Thai law, or conducting independent research on that law. Pet. 22-25. That argument has no merit because it is based on the false premise that the court of appeals ruled against Fin One because it did not meet an evidentiary burden to prove Thai law as a matter of fact. The Decision says no such thing and certainly did not create a "bizarre rule" (Pet. 28) that disadvantages litigants seeking to invoke foreign law by unfairly penalizing them if they are unable to adequately substantiate that law.

consistent with the Second Circuit while at the same time properly utilizing the Rule's inherent flexibility.[5] Fin One mistakenly labels the slight procedural variations from court to court and case to case — which are part of the inherent flexibility of Rule 44.1 — as a "multifaceted split among the circuits." Pet. 26. Fin One's argument ignores that this flexibility is fundamentally necessary if federal courts are to effectively apply foreign law from a variety of very different legal systems.

B. The Second Circuit Correctly Utilized Rule 44.1 To Determine Thai Law

Because the Decision did not overrule Second Circuit precedent and there is no circuit split, Fin One is reduced to arguing, in essence, that the court of appeals incorrectly applied the applicable legal standard — an argument that rarely justifies Supreme Court review. *See* Sup. Ct. R. 10. In any event, there can be no doubt that the Second Circuit properly utilized Rule 44.1 here and correctly interpreted and applied Thai law.

In its Decision, the court of appeals properly reviewed the district court's determination of Thai law *de novo*. Pet. App. 29a. The court of appeals correctly recognized that, because Thailand is a civil-law country, the Code (as opposed

5. *See, e.g, Jinro Am. Inc. v. Secure Invs., Inc.*, 266 F.3d 993, 1000 (9th Cir. 2001); *Access Telecom, Inc. v. MCI Telecomm. Corp.*, 197 F.3d 694, 713 (5th Cir. 1999); *Servicios Comerciales Andinos, S.A. v. Gen. Elec. Del Caribe, Inc.*, 145 F.3d 463, 469-70 (1st Cir. 1998); *Tschira v. Willingham*, 135 F.3d 1077, 1084 (6th Cir. 1998); *Grupo Protexa, S.A. v. All Am. Marine Slip*, 20 F.3d 1224, 1239-40 (3d Cir. 1994); *Basch v. Westinghouse Elec. Corp.*, 777 F.2d 165, 169-70 (4th Cir. 1985); *Twohy v. First Nat'l Bank of Chicago*, 758 F.2d 1185, 1192 (7th Cir. 1985).

to "case law" in the Anglo-American tradition) is the authoritative source of Thai law and that Thai court decisions — especially lower court decisions — are not precedent or otherwise binding.[6] Pet. App. 35a. Accordingly, in considering whether LBSF's set-off was permitted, the Second Circuit properly devoted substantial attention to interpreting the principal Thai law in question — Section 341 of the Thai Code — and applying that law to the facts of this case. The Second Circuit (like both the Special Master and the district court) concluded that Section 341 provides an "unambiguous right to set off mutual obligations against one another," absent a legitimate defense to the claim being used for set-off. Pet. App. 31a. Applied to these facts, this simply means that LBSF was entitled to use its claim against Fin One for payment on the Bills of Exchange to reduce Fin One's claim against it on the Swap Transactions, unless LBSF's claim for payment on the Bills was not enforceable. Pet. App. 113a.

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6. The Special Master also correctly reached this conclusion of law (Pet. App. 103a-104a), which is consistent with the holding in many cases. *See Am. Int'l Specialty Lines Ins. Co. v. Canal Indem. Co.*, 352 F.3d 254, 261 (5th Cir. 2003) (judicial precedent in a civil-law jurisdiction, "even when so cohesive and entrenched as 'to rise to the level of *jurisprudence constante*,' is merely a 'secondary law source'"); *Curley*, 153 F.3d at 14 ("[a]s a civil law jurisdiction, Mexican courts consider the text of the constitution, civil code and statutory provisions as the primary source of law and give them preponderant consideration"); *Phoenix Canada Oil Co. v. Texaco, Inc.*, 842 F.2d 1466, 1480 (3d Cir. 1988) (noting "the lack of precedential effect of judicial decisions in civil law jurisdictions"); *Aktiebolag v. Andrx Pharm., Inc.*, 208 F.R.D. 92, 100 (S.D.N.Y. 2002) (judges in civil law countries do not make new law in the sense that common law courts do; instead, they interpret the statutory codes of their countries).

Fin One argued that LBSF's claim based on the Bills of Exchange was not enforceable because the Ministry Orders prohibited Fin One from voluntarily making payment on them. The Second Circuit carefully considered this argument and found it unpersuasive. Pet. App. 32a-33a. In reaching its conclusion, the court of appeals first looked to the plain language of the Ministry Orders themselves (Pet. App. 32a), which is the well-established primary method of interpreting such documents. *See Williams v. Taylor*, 529 U.S. 420, 431 (2000); *see also* Pet. App. 104a (citing Thai law). The Second Circuit reasoned that while the Ministry Orders "clearly forbade Fin One from voluntarily making payment on any of its outstanding bills of exchange," the plain language of those Orders in no way suggests that they could be used by Fin One as a defense against LBSF enforcing a claim for payment on the Bills. Pet. App. 32a-33a.[7] The court of appeals further noted that this plain language interpretation of the Ministry Orders was consistent with other relevant sections of the Thai Code, including, in particular, "Section 342, which renders setoff a right exercisable unilaterally, with no requirement that the other party consent." Pet. App. 33a. Thus, the court of appeals concluded Fin One had not shown that the Ministry Orders gave it a valid defense pursuant to Section 344 of the Code to LBSF's right to payment on the Bills of Exchange, and therefore the Bills could be set-off against debts LBSF owed Fin One pursuant to Section 341 of the Code.

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7. Although not relied upon by the court of appeals in the Decision, the Ministry of Finance — as a regulatory body with limited authority — cannot issue orders having the force of law as to the general public or that contradict the Thai Code. JA 1252-53. Thus, while the Ministry Orders were clearly binding on Fin One (over which the Ministry of Finance had authority) they could not be binding on LBSF as a matter of Thai law. *Id.*

Equally flawed is Fin One's argument that Rule 44.1 was violated by the court of appeals supposedly "recasting" the "critical legal issue" raised by the Ministry Orders. Pet. 21. Contrary to Fin One's contention, the Decision simply recognizes what has always been the legal issue with respect to the Ministry Orders: if the Orders gave Fin One a valid defense to a claim by LBSF for payment on the Bills of Exchange, then Section 344 of the Thai Code would prevent LBSF from using the Bills of Exchange as a set-off to reduce any debt owed by LBSF to Fin One.[8] Pet. App. 32a-33a, 113a. But, as noted above, the Ministry Orders did not provide such a defense, as the Special Master, district court and the Second Circuit all found. In any event, "[t]here is no requirement [under Rule 44.1] that the court give formal notice to the parties of its intention . . . to raise and determine independently an issue not raised by them." Fed. R. Civ. P. 44.1, Adv. Cmte. Note. "To require . . . that the court give formal notice from time to time as it proceeds with its study of the foreign law would add an element of undesirable rigidity to the procedure for determining issues of foreign law." *Id.*

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8. Contrary to Fin One's contention, the applicability of the Ministry Orders to LBSF's set-off has been briefed extensively in this case, both in the district court and at the Second Circuit. LBSF argued to the Second Circuit in no uncertain terms that the Ministry Orders did not provide Fin One with a defense to LBSF's claim on the Bills of Exchange and therefore did not prohibit the set-off. Fin One also addressed the impact of the Ministry Orders on set-off under the Thai Code, dedicating almost six full pages of its briefs on appeal to this issue. There is simply no basis in the record for Fin One's conclusory assertion that it did not have notice of this issue and that due process is somehow implicated.

II. PRINCIPLES OF INTERNATIONAL COMITY ARE NOT IMPLICATED HERE

Fin One also argues that the Second Circuit ignored principles of international comity because the Decision reached a different outcome in this case than was reached by a lower Thai court in the unrelated *Huaykaew* case, which involved different parties and different facts. Pet. 13-17.

As a threshold matter, principles of international comity are inapplicable to this case. International comity generally requires the recognition of foreign legal proceedings and judgments in appropriate circumstances. *See Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895). As the decisions cited by Fin One demonstrate, international comity concerns typically arise in circumstances not present here — such as where there are parallel or related foreign proceedings, foreign judgments, cases in which a foreign sovereign is a party, or injunctions directed to a foreign sovereign or foreign citizens on foreign soil.[9] Comity principles do not control the procedure used by a federal court to interpret foreign law under Rule 44.1, and the well-established body of authority regarding that Rule — including the Rule 44.1 cases relied on by Fin One —

9. *See, e.g., Gen. Elec. Co. v. Deutz A.G.*, 270 F.3d 144, 160 (3d Cir. 2001) (injunction barring parallel foreign proceeding was inconsistent with international comity); *U.S. ex rel. Saroop v. Garcia*, 109 F.3d 165, 169 (3d Cir. 1997) (recognizing foreign judgment under principles of comity); *Republic of Phil. v. Westinghouse Elec. Corp.*, 43 F.3d 65, 75 (3d Cir. 1994) (vacating injunction barring Philippines government from certain actions); *see also Films by Jove, Inc. v. Berov*, 250 F. Supp. 2d 156, 176-77, 191 (E.D.N.Y. 2003) (discussing comity and Rule 44.1 in connection with related foreign proceedings) (relied on by Fin One, Pet. 12-13).

does not suggest otherwise.[10] *See, e.g., Pittway Corp. v. United States*, 88 F.3d 501, 504-05 (7th Cir. 1999); *Bamberger v. Clark*, 390 F.2d 485, 488 (D.C. Cir. 1968).

Even if international comity were relevant here, the Decision still could not be challenged (let alone be deemed worthy of certiorari) because Fin One's entire international comity argument comes down to nothing more than the unremarkable observation that the Decision reached a different outcome than was reached by the *Huaykaew* court in an entirely separate case with different parties and different facts. Pet. 16-17. Fin One's argument ignores the factual difference between the two cases and the careful reasoning of the Decision. First, contrary to Fin One's contention, the Second Circuit did *not* fail to follow Thai law in reaching an outcome different from *Huaykaew*. The authoritative source of Thai law is the Thai Code, not the holding of one fact-specific Thai lower court case, and the Second Circuit analyzed the Thai Code in detail in its Decision. Pet. App. 34a-35a.

Second, the Second Circuit did not create a blanket "civil law exception" to determining foreign law by reaching an outcome different from *Huaykaew*. In determining foreign law, federal courts necessarily have to consider what precedential effect (if any) the relevant foreign legal authority would have if it were to be considered by *the foreign court* — which effect may well depend on whether the country is a

10. In any event, even in situations where international comity principles are implicated, many decisions (including ones relied upon by Fin One) have held that deference is not necessarily required. *See Hilton*, 159 U.S. at 163-64; *Films by Jove*, 250 F. Supp. 2d at 191-92 (relied on by Fin One, Pet. 11 & 13-14); *see also In re Treco*, 240 F.3d 148, 157 (2d Cir. 2001).

common law or civil code jurisdiction.[11] *See, e.g., Henry v. S/S Bermuda Star*, 863 F.2d 1225, 1236 (5th Cir. 1989) (considering Panamanian law "within the constraints of a civilian law system" and disregarding two Panamanian decisions and Cabinet decree and following the text of the code); *Phoenix Canada Oil Co.*, 842 F.2d at 1480 (declining to follow decision of the Supreme Court of Ecuador, a civil-law jurisdiction); *see also Chevron USA, Inc. v. Vermilion Parish Sch. Bd.*, 377 F.3d 459, 462 (5th Cir. 2004) ("although we may be guided by decisions rendered by . . . courts, we are not strictly bound by them, particularly when the jurisprudence has not developed to the status of *jurisprudence constante* (a series of decisions in accord on a given issue)").

In any event, Fin One's argument that the Second Circuit declined to follow *Huaykaew* "solely because it was not binding" is belied by the Decision, which demonstrates that the Second Circuit carefully analyzed that case. Contrary to Fin One's repeated claims, the Second Circuit did *not* find *Huaykaew* to be "indistinguishable," but instead recognized

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11. Even if *Huaykaew* were precedent (and was not factually distinguishable), the court of appeals quite properly could disagree with the *Huaykaew* court's interpretation of Thai law. While federal courts may afford some degree of deference to a foreign court's interpretation of its laws under appropriate circumstances, such deference is certainly not required. *See Films by Jove*, 250 F. Supp. 2d at 192 ("[d]eference to [a foreign court's] legal conclusions, without analysis of their persuasiveness or consideration of other factors that might counsel against following that court's interpretation [of its own law], is not required"); *see also Access Telecom*, 197 F.3d at 714 (refusing to afford deference to Mexican government agency's interpretation of Mexican law); *Itar-Tass Russian News Agency v. Russ. Kurier, Inc.*, 153 F.3d 82, 93 n.14 (2d Cir. 1998) (declining to follow Russian opinion which court found "unpersuasive").

a "significant distinction" between that case and the case at bar. Pet. App. 34a-35a.[12] In *Huaykaew*, the court made a specific finding of bad faith because the defendant acquired the debt instruments *knowing* that the financial institution owing on those instruments had been suspended. Pet. App. 33a-34a. In contrast, LBSF acquired the Bills of Exchange *before* Fin One was suspended and *before* that event was public knowledge (Pet. App. 34a), and there is no basis for Fin One's suggestion otherwise.[13] Unlike *Huaykaew*, there was simply nothing in this case to give the Second Circuit any reason to disregard the presumption of good faith contained in the Thai Code. Pet. App. 35a.

Finally, the Second Circuit also considered Fin One's argument that LBSF's set-off violated "Thai public policy of ensuring equity among similarly situated creditors," and

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12. Thus, Fin One's argument that ruling in its favor on the first question presented would mandate judgment for Fin One as a matter of law (Pet. 27 n.8) is nonsensical. That argument is predicated solely upon the assumption that this case and *Huaykaew* are "concededly-indistinguishable" when, in fact, the court of appeals recognized that these cases *are* distinguishable in a significant respect.

13. Fin One attempts to avoid this key distinction between this case and *Huaykaew* by arguing that the Special Master erroneously focused on LBSF's intent when it *presented* the Bills of Exchange for set-off, rather than when LBSF *acquired* the Bills of Exchange, and that the Second Circuit "simply repeated the Special Master's flawed analysis." Pet. 9-10 n.2. Once again, Fin One's position finds no support in the record. Even if Fin One's reading of the Special Master's Report were correct, it is of no consequence as the Second Circuit — in reviewing the district court's decision *de novo* — made clear that *Huaykaew* was distinguishable based on LBSF's knowledge when "LBSF *acquired* the bills. . . ." Pet. App. 34a (emphasis added).

that any reduction in LBSF's debt via set-off would provide a "windfall" to LBSF "at the expense of those creditors of Fin One not lucky enough to owe it outstanding debts." Pet. App. 37a-38a. The Second Circuit correctly noted that LBSF was "not similarly situated to creditors who are seeking payment as opposed to setoff" and thus there was no basis for Fin One's claim that LBSF was being given an undue advantage relative to Fin One's general creditors or was receiving a "windfall." Pet. App. 37a-38a; *see also generally S.E.C. v. Elliott*, 953 F.2d 1560, 1572-73 (11th Cir. 1992). In reaching that conclusion, the court of appeals relied on Thai statutory law which treats "the right to setoff differently from the right to receive actual payment of an obligation," such as in the "immediate effectiveness of setoff on unilateral declaration and the lack of a surrender precondition" to set-off. Pet. App. 37a. These factors, in conjunction with LBSF's statutory right to set-off under the Thai Code, led the Second Circuit correctly to conclude that no "Thai public policy [wa]s actually implicated by LBSF's exercise of its setoff right." Pet. App. 37a.[14]

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14. In a transparent attempt to make this obviously unique case appear to have general relevance, Fin One also argues that the Decision will result in "retaliation" from other countries. Pet. 29. Fin One has submitted absolutely no evidence that the Decision in this case has had any impact on the economic relations between the United States and Thailand, or any other American interests abroad. In any event, even if this might be true (and there is no reason to believe it is), it would provide no basis for this Court to review a decision which complies in every respect with well-settled precedent regarding the interpretation and application of foreign law.

CONCLUSION

For the foregoing reasons, Finance One Public Company Limited's Petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

FINANCE ONE PUBLIC COMPANY LIMITED,

Petitioner,

—v.—

LEHMAN BROTHERS SPECIAL FINANCING, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The Petition demonstrates that the Second Circuit committed two serious errors in evaluating and applying foreign law, errors which foster uncertainty, threaten international discord, and undermine the principles of comity between nations. In response, LBSF engages in obfuscation and mischaracterization in an effort to deflect attention from the cert-worthy issues presented.[1]

Contrary to LBSF's suggestion (Opp. 1), this is not a case where two parties owed each other money and one party simply setoff one mutual obligation against another. To the contrary, LBSF owed FinOne money under the derivative transactions, and a different Lehman affiliate based in Thailand, Lehman (Thailand), held FinOne debt on which it could not collect. The issue in the lower courts was whether, by the mechanism of assignment after FinOne was insolvent and with knowledge of that insolvency, LBSF can recoup the full value of debt that otherwise would be uncollectible.

The Second Circuit's decision permitting that setoff rested on two errors of broad significance that warrant correction by this Court to end conflict among the lower federal courts. *First*, the court disregarded orders of the Thai Fi-

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[1] LBSF inaccurately asserts that FinOne's arguments "were rejected by the Special Master, the district court, and the Second Circuit." (Opp. 2). Only the Second Circuit ruled, in significant part *sua sponte*, that LBSF should be entitled to setoff the face amount of the Bills. LBSF also falsely claims that FinOne "did not object to the set-off at the time it was made" and "informed LBSF in writing" that the setoff was valid. (Opp. 5). LBSF offered FinOne an extra $1 million if FinOne would consent to the setoff when it was made and was informed by FinOne at that time and repeatedly thereafter that the Ministry of Finance Orders prohibited any setoff. *See, e.g.*, A 302-03, A 421.

nance Ministry that made the Bills nonpayable. The court reached this result only by concluding that FinOne failed to "definitively" prove the effect of those Orders, an evidentiary requirement that directly contravened Federal Rule of Civil Procedure 44.1. *Second*, the court disregarded a directly-on-point Thai judicial decision solely because it was a non-binding civil law case. In refusing to follow a Thai law decision that would have mandated a trial on LBSF's good faith, the Second Circuit flouted cardinal international comity principles.

These errors are of far greater significance than this particular case (Opp. 11). The Second Circuit's decision cuts to the core of the principles underpinning U.S. courts' determinations of foreign law. The Court should grant the petition and resolve the two issues presented – issues where ending disarray among the lower courts is urgently needed given our increasingly interconnected global economy and the large number of suits involving foreign law resolved by U.S. courts.[2]

ARGUMENT

1. Respondent devotes its Opposition to attacking strawmen by rewriting the Second Circuit's reasoning in a failed effort to mask the important issues FinOne raises. First, the Court did not, as Respondent suggests, distinguish *Huaykaew* on the facts (Opp. 9, 21-23); rather, the Court held

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[2] LBSF feigns surprise that FinOne chose to bring its action in the Southern District of New York (Opp.1-2), but FinOne sued to recover on derivative obligations containing New York choice-of-law and choice-of-forum clauses, making New York the appropriate place to bring suit. Only LBSF's defense of setoff, which it asserted as an extra-contractual right, implicated Thai legal principles.

that it had to confront whether to follow *Huaykaew* head on precisely *because* the one factual distinction it noted was immaterial. Pet. App. 34a-35a. The Second Circuit then disregarded *Huaykaew solely* because it was a non-binding civil law case, precisely the circumstance that the conflicting cases cited by FinOne explain is not "persuasive data" sufficient to ignore foreign precedent consistent with principles of comity. *See Films by Jove, Inc. v. Berov*, 250 F. Supp. 2d 156, 196 (E.D.N.Y. 2003); *American Int'l Specialty Lines Ins. Co. v. Canal Indemnity Co.*, 352 F.3d 254, 261 (5th Cir. 2003); *see also* Doug M. Keller, Interpreting Foreign Law Through An Erie Lens, 40 Tex. Int'l. L.J. 157, 177 (2004).

Second, the Opposition sidesteps the Second Circuit's reason for concluding that the Finance Ministry's Orders did not preclude a setoff (Opp. 8, 12, 18). The Second Circuit rejected FinOne's position not because "the plain language of those Orders" supported the court's conclusion (Opp. 18), but rather because the materials submitted by the parties did not "definitively" resolve the issue of the effect of the Finance Ministry's Orders on a hypothetical action for payment (Pet. App. 33a), a formulation of the legal issue (contrary to Respondent's assertion, Opp. 19 & n.8) neither side had raised.

When Respondent's recitation of the Second Circuit's reasoning is exposed as flawed, it is apparent that the two errors FinOne identifies are important, reflect divisions among the lower courts and within the Second Circuit, and merit rectification by this Court.

2. Respondent's argument that the Second Circuit has in other cases adhered to Federal Rule 44.1 (Opp. 13) is misdirected. Whether prior Second Circuit panels properly applied Rule 44.1 is beside the point; *this* panel plainly did

not, as it rejected FinOne's argument that the Thai Finance Ministry's Orders prohibited payment of the Bills based on FinOne's failure to meet an improperly imposed evidentiary burden of "definitively" substantiating foreign law (Pet. App. 33a). That the Second Circuit purported to review the district court's decision *de novo* ignores what the panel in fact *did*, which was to refuse to decide the foreign law issue it identified because the sources submitted by the parties did not "definitively resolve[ ]" it (Pet. App. 33a), thereby effectively treating the Rule 44.1 determination as one of fact and not one of law. At most, Respondent highlights that the split here is not only among the courts of appeal, but also within the Second Circuit, which is an additional ground for this Court to grant certiorari. *See, e.g., Scarborough v. United States*, 431 U.S. 563, 567 n.4 (1977) (certiorari granted because of "split among the circuits," one circuit being noted as having an intracircuit conflict); *Dickenson v. Petroleum Conversion Corp.*, 338 U.S. 507, 508 (1950) (certiorari granted "[b]ecause of this intracircuit conflict"); *John Hancock Ins. Co. v. Bartels*, 308 U.S. 180, 181 (1939) (certiorari granted because of intracircuit conflict and the importance of the question).

3. Respondent is equally wrong that the circuits are not in conflict on the important Rule 44.1 issue presented. The Petition demonstrates (Pet. 22-25) that the federal courts of appeals are divided on the permissible remedies under Rule 44.1 when a point of foreign law has not been adequately substantiated. Respondent cannot and does not contest that the Second Circuit's ruling is at odds with *Twohy v. First National Bank of Chicago*, 758 F.2d 1185 (7th Cir. 1985), and other cases recognizing that Rule 44.1 does not permit holding against a litigant on the merits merely for failing to definitively substantiate a point of foreign law raised by the court, even if other remedies are permissible. It is one

thing, as Rule 44.1's Advisory Committee Note explicitly recognizes, for the federal courts to employ "flexible procedures" in determining foreign law (Opp. 19). It is quite another, and as commentators recognize and *Twohy* holds (Pet. 19-22) impermissible, to abrogate Rule 44.1's command that a court must treat the determination of foreign law as an issue of "law" by applying evidentiary burdens of persuasion.[3]

Moreover, Respondent ignores that both the First and Third Circuits have also expressed the incorrect view that "foreign law is treated as a fact that must be proven by the parties." *Getty Petroleum Mktg., Inc. v. Capital Terminal Co.*, 391 F.3d 312, 326 n.20 (1st Cir. 2004) (*citing Audile v. Ashcroft*, 242 F.3d 477, 489 n.10 (3rd Cir. 2001)). Accordingly, at least two other circuits endorse the Second Circuit's flawed approach to Rule 44.1. This case thus presents precisely the sort of ripe "conflict in principle" that warrants granting certiorari. *See United States v. Johnson*, 481 U.S. 681, 685 n.4 (1987); *Oregon Department of Fish and Wildlife, et al. v. Klamath Indian Tribe*, 473 U.S. 753, 764 (1985); *Boesche v. Udall*, 373 U.S. 472, 473 (1963); *The Monrosa v. Carpen Black Export, Inc.*, 359 U.S. 180, 181 (1959).

4. The Second Circuit's imposition of an evidentiary burden contrary to Rule 44.1 was not, as Respondent suggests (Opp. 18 & n.7), harmless error. The Second Circuit ignored compelling materials in the record demonstrating that the Thai Ministry of Finance Orders *would* constitute a defense to a civil action for payment of the Bills. For example, the plain language of the July Order provides that "the

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[3] It is true that Rule 44.1 does not require notice (Opp. 19); but a court cannot raise an issue *sua sponte* and then rule against the litigant for failing to definitively substantiate it. That is precisely the catch-22 that *Twohy* recognizes Rule 44.1 forbids. *See* Pet. 20.

Company shall . . . not make any repayment under the promissory notes, bills of exchange and certificate[s] of deposit." Pet. App. 124a. In addition, the Special Master agreed that the Finance Ministry's Orders rendered the bills non-payable:

> The entitlement of LBSF [to setoff], if any, cannot as such exist or pre-exist *in vacuum*. It cannot exist in isolation without any duty-bearer to discharge the corresponding or correlative obligation. To assert as LBSF did, fully supported by its expert witness on Thai law, that LBSF is entitled to an extra-contractual set-off right, would still be meaningless unless LBSF could also prove that FinOne, having been indefinitely ordered to suspend its business operations since June 25, 1997 (or June 27, 1997 at the very latest) and definitely to cease permanently its business operations since July 25, 1997, was still able under the applicable relevant Thai law to continue to bear the responsibility of honouring its debts or obligations under any Bills of Exchange yet immature or even those already mature but as yet unredeemed. As admitted by both parties, the Order of the Ministry of Finance of June 25, 1997, although not binding directly on LBSF, was undoubtedly binding on all 16 finance companies whose business operations were suspended by the ministerial order. The direct or less-direct result of this executive order is uncontested. It entailed the intended legal effect that FinOne, along with 15 other finance companies listed in the Order, was no longer qualified, nor was it any longer in the position to, fulfill its existing or pre-existing or future obligations, nor even to honour or redeem

> its Bills of Exchange or other forms of negotiable instruments without the prior approval of the supervisor or comptroller appointed by the Ministry of Finance and the Bank of Thailand under the auspices of the FRA (Financial Sector Restructuring Authority).

Pet. App. 93a-94a, ¶ 13. The Second Circuit, however, failed to grapple with the significance of these materials, instead hiding behind its requirement that FinOne "definitively" prove foreign law and concluding that FinOne had not. Had the Second Circuit instead *determined* foreign law from the available materials (or ordered further briefing on the matter, another permissible remedy, *see* Opp. 15 n.4), the Second Circuit would have ruled in FinOne's favor and precluded the setoff.[4]

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[4] There is no merit to LBSF's suggestion that the Orders did not carry the force of law or contradicted Thailand's Civil and Commercial Code (Opp. 18 n. 7). The Special Master recognized that the Orders have the force of law. Pet. App. 93a-96a, ¶¶ 13-18. By specifying that obligations to be setoff must be fully enforceable, the Code allows for the possibility that the Ministry of Finance could exercise its regulatory powers to determine the Bills' enforceability, and thus the availability of setoff. LBSF also incorrectly asserts that FinOne reads the Orders to prohibit FinOne "from voluntarily making payment" on the Bills (Opp. 18). As FinOne's Thai legal expert demonstrated, the Orders' plain language *barred* payment by FinOne, including by setoff. *See, e.g.*, A 1338, ¶ 21. Once the Orders are recognized to preclude setoff, the same principles that underlie the Act of State doctrine require following those Orders. *See Braka v. Bancomer*, 762 F.2d 222, 225 (2d Cir. 1985) ("Were we to issue the order [plaintiffs] seek, we would find ourselves directing a state-owned entity to violate its own national law with respect to an obligation wholly controlled by Mexican law."); *Callejo v. Bancomer*, 764 F.2d 1101, 1116 (5th Cir. 1985) (similar).